United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1693
74-1704

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

vs.

TILNEY & COMPANY, FREDERICK TILNEY,

Defendants-Appellants.

On Appeal from Judgment of the United States District Court for the Southern District of New York

BRIEF FOR CROSS-APPELLANT AND APPELLEE, I. ALAN HARRIS, FORMER RECEIVER

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1693
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Calendar No.

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

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Defendants-Appellants.

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BRIEF FOR CROSS-APPELLANT AND APPELLEE
I. ALAN HARRIS, Former Receiver

Statement of the Case

An appeal and a cross-appeal are before this Court. The appeal is by defendants-appellants Tilney & Company ("the Tilney Company") and Frederick Tilney ("Tilney") from three orders of Chief Judge David N. Edelstein entered in the United States District Court for the Southern District of New York in an equity

receivership proceeding relating to the estate of a former broker-dealer, the Tilney Company, and to Tilney, its owner and controlling person.

The April 18, 1972 order (App. 1021)* denied, because of clear conflict of interest, the substitution of certain attorneys as counsel for defendants-appellants. The December 21, 1972 order (App. 1243) awarded allowances to cross-appellant and appellee, I. Alan Harris ("Harris"), who served as co-receiver from December 18, 1967 to July 16, 1969, to Joseph C. Hogan ("Hogan"), the other co-receiver, and to the attorneys and accountants for the receivers. The March 20, 1974 order (App. 1402), as modified by an order entered April 19, 1974 (App. 1419), approved the final account of Hogan and Harris, denied Tilney permission to proceed pro se on a spurious surcharge application, and, in effect, terminated the receivership. The remaining assets of the estate are in the possession of receiver Hogan, since Tilney has failed to

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*Numerical references in parentheses preceded by "App." are to pages of the Deferred Joint Appendix. Numerical references preceded by "Def. Br." are to pages of the brief of defendants-appellants. Other numerical references in parentheses refer to pages of ducments or transcripts contained in the record certified from the court below, except that numerical references preceded by "Hogan Br." are to pages of the brief of co-receiver Hogan.

post a required bond of $25,000 (Hogan Br., pp. 4-5).

The cross-appeal is by Harris from the order of December 21, 1972 (App. 1243) which, for 884.7 hours of services to the receivership estate described in part below (Harris report, p. 74; App. 488) awarded him $23,800 or approximately $27 per hour. Harris had requested an allowance of $57,500 (Harris report, p. 75; App. 489) or approximately $65 per hour. In determining the allowance to Harris, the court below charged Harris with the sum of $7,000, the approximate cost and expense of a public auction of the shares of The Waddington Bank (Opinion 10/19/72, p. 10; App. 1199). It is the reduction in requested allowance from $57,500 to $23,800 and the charge of $7,000 that Harris claims as error.

Chief Judge Edelstein presided throughout the proceedings below. The order appealed from by cross-appellant Harris was not reported.

Statement of Issues

The issues with respect to the appeal of the Tilney Company and Tilney are stated in the brief of receiver Hogan. Harris adopts those issues, but only in so far as they relate to the services of Harris as a

receiver from December 18, 1967 to July 16, 1969, a period of approximately 19 months, and except as noted below with respect to Harris's cross-appeal. Based upon the facts and law set forth in the Hogan brief and in this brief, the judgments, orders and rulings appealed from by defendants-appellants should be affirmed in all respects as to said parties.

The issues with respect to the Harris cross-appeal are:

1. Did not the court below err in reducing the allowances of Harris from $57,500 to $23,800, or from approximately $65 per hour for the 884.7 hours of Harris's services to approximately $27 per hour for such services?

2. Did not the court below err in surcharging Harris with $7,000 of costs and expenses of the public auction of the shares of The Waddington Bank, particularly since it was Tilney who misled the court below, the receivers and the Securities and Exchange Commission into believing that the shares were worth $70 to $80 per share and would bring that price at auction?

3. Would not a fair allowance for the nature and quality of Harris's 884.7 hours of service,

considering his professional and business background and experience and the administrative services rendered by Harris' office with its related overhead, be at least $65 per hour or an allowance of $57,500 as originally applied for by Harris, exclusive of Harris' disbursements?

4. In any event, should not Harris receive an additional allowance of $7,000, the sum which the court below surcharged Harris for costs and expenses of the estate to auction the shares of The Waddington Bank, particularly since the court below found, after hearing, that Harris was not guilty of any misconduct in the original sale of such shares at the highest price obtained of $50 per share and since Tilney misled everyone into believing that a public auction would bring a materially higher price?

5. Should not Harris also recover the costs and expenses of this appeal and cross-appeal, including his reasonable attorneys' fees in connection therewith?

Statement of the Facts

Introduction

On November 28, 1967, the Securities and Exchange Commission (the "SEC") filed a complaint alleging that the Tilney Company was in violation of Section 15(c)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78o (c)(3)) and the applicable net capital rule (17 C.F.R. 240.15c3-1) promulgated thereunder, and that Tilney, individually, aided and abetted such violation (Complaint 11/28/67; App. 11).

Tilney and the Tilney Company had already been parties to a Consent Judgment of Permanent Injunction entered on September 29, 1967 that restrained Tilney and the Tilney Company from transferring any of their assets in connection with an action brought by the SEC by reason of violations of Section 17(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(a)). After a hearing on December 6, 1967, a consent judgment was entered on December 18, 1967 (Consent Judgment 12/18/67; App. 25) in the action commenced on November 28, 1967 which, among other things:

1. Enjoined further violations by Tilney and the Tilney Company of Section 15(c)(3) of the Securities Exchange

Act of 1934 and of 17 C.F.R. 240.15c3-1 promulgated thereunder (Consent Judgment, 12/18/67, p. 2; App. 26);

2. Enjoined Tilney and the Tilney Company from transferring or disposing of any of their assets or any assets of third parties that might be in their possession (Consent Judgment, 12/18/68, pp. 2-3; App. 26-27); and

3. Appointed I. Alan Harris and Joseph C. Hogan receivers of all assets belonging to or in the possession of Tilney and the Tilney Company (Consent Judgment, 12/18/68, p. 3; App. 27).

The decretal paragraph of the Consent Judgment of December 18, 1968 that appointed the receivers:

> "... authorized, empowered and directed [the Receivers] to have full power to marshal such assets and property, prosecute all claims, choses-in-action and suits in equity on behalf of the said defendants, to collect and take charge of all and singular thereof and to liquidate the estate of said defendants in order to pay all just claims and all creditors of the said defendants." (Consent Judgment, 12/18/68, p. 3; App. 27) (emphasis added).

As will be demonstrated in this brief, all acts of Harris and Hogan as co-receivers during the 19-month period of Harris' co-receivership were expressly authorized by the directive of the Court below to liquidate the estates of Tilney and the Tilney Company.

The affairs and property of Tilney and of the Tilney Company at December 18, 1967 were in a confused state owing to the "complex and interrelated affairs" (Harris report, p. 7; App.421) of Tilney, the Tilney Company, Tilney's wife, Tilney's children and various corporations controlled by Tilney but not parties to the proceedings below. The complexity of the various actual and claimed relationships and transactions led to the receivers retaining, in January 1968, the accounting firm of B. Bernard Greidinger & Company and the law firm of Wagner, Quillinan & Tennant for assistance and counsel (Harris report, p. 6; App.420).

From the day of his appointment until his withdrawal as a co-receiver on July 16, 1969 (Order, 7/16/69; App.296) Harris worked virtually on a daily basis on behalf of the receivership estate (Schedule to Harris report, pp. 1-31; App.491-521).For the facts and circumstances surrounding Harris' withdrawal, see the section of this brief entitled The Waddington Bank, pp. 27-35, infra.

On December 16, 1967, the date of his appointment as co-receiver, Harris commenced devoting immense amounts of time and effort to his responsibilities on behalf of the receivership estate. Harris and his co-receiver

Hogan initially had to familiarize themselves with the state of the defendants' affairs, identify the assets of the receivership estates and, pursuant to the directive contained in the Consent Judgment of December 18, 1968 (App. 27), proceed to liquidate those assets (Harris report, pp. 6-7; App. 420-421).

Harris indeed acted expeditiously. On February 27, 1968, little more than two months after his appointment, Harris reported to the Court that, among other things, the receivers had already liquidated shares of Valley National Bank; First National Bank, Yonkers; and Bank of Babylon owned by the receivership estate (Transcript, 2/27/68, p. 7; App. 46); that the liability of the receivership estate for rent for the offices of the Tilney Company at 1 Wall Street had been terminated (Transcript, 2/27/68, pp. 18-19; App. 57-58); and that the debt of the receivership estate to Bankers Trust Company had been paid (Transcript, 2/27/68; p. 3; App. 42). Harris also reported that there was a problem in evaluating the shares of the receivership estate in The Waddington Bank because that bank was in the process of writing-off loans that were substantial in size for a bank such as Waddington with only $1,500,000 in resources (Transcript 2/27/68, pp. 34-35; App. 61-62).

Tilney was present at virtually all hearings in this proceeding in the court below. He was in close contact with the receivers and kept fully abreast of all transactions of the receivers and acquiesced or consented to all dispositions of assets of the receivership estate by the receivers. After hearing Harris' status report at the hearing of February 27, 1968, Tilney rose and thanked the court for appointing two very fine men who are excellent receivers. Noting that, since December 18, 1967, the receivers had liquidated approximately $350,000 of assets, Tilney stated with reference to the receivers, "I think they have done a great job." (Transcript, 2/27/68, pp. 100-102; App. 65-67).

By August 6, 1968, Harris reported to the Court that, in addition to Bankers Trust Company, the debts of the receivership estate to Marine Midland Bank had been paid and the debt to Long Island National Bank was in the process of being paid (Transcript, 8/6/68, p. 195; App. 104). Harris also reported that small amounts of shares in Alaska State Bank had been sold and that Tilney indicated that the price received was fair (Transcript, 8/6/68, p. 197; App.106).

On April 7, 1969, when there was a discussion in court as to the best method to sell the shares of the

receivership estate in Matanuska Bank, Tilney stated to the court that the only way to sell the shares is the same way other bank shares were sold, namely, by contacting officers of the bank in question for information as to valuation and for leads as to possible buyers (Transcript, 4/7/69, p. 34; App.165).

Set forth below is a summary of the more significant achievements of Harris and of Hogan, his co-receiver, during Harris' 19-month tenure as co-receiver:

Office at 1 Wall Street

When the receivers were appointed, the office of the Tilney Company at 1 Wall Street was occupied under a written lease naming as tenants both the Tilney Company, and Governmental Statistical Corporation ("GSC"), a corporation controlled by Tilney but not a party to this action. On January 3, 1968, the landlord stated that the total arrears in rent on that office amounted to $6,745.73. The receivers advised Tilney that they would not permit the accrual of any unreasonable administration expenses and that plans must be made to vacate the premises as soon as possible.

The receivers and their accountants examined the books, records and files at the 1 Wall Street Office,

and decisions were made as to which of such files belonged to and were vital to the receivership. In the belief of the receivers and Tilney that economy of administration would result therefrom, arrangements were made for transporting the necessary files to premises owned by GSC at Hicksville, Long Island, where the files were to be kept without expense. Arrangements were made for security measures and for the maintenance of all such files under locks to be opened only by the receivers or their accountants. The office at 1 Wall Street was vacated on February 16, 1968 (Harris report, pp. 15-16; App. 429-430; Transcript, 2/27/68, pp. 18-19; App. 57-58).

Dealings with Creditors and Customers

Early in the receivership, the receivers discovered through their examination of the voluminous files and papers turned over to them, that customers of Tilney and of the Tilney Company had been ignored for many months, leading, understandably, to complaining and threatening letters from them. Accordingly, a letter from the receivers dated February 26, 1968 was sent to all known trade creditors and customers of the Tilney Company and of Tilney. The financial affairs of the receivership estates had been and were extremely involved, complicated and intermingled

with the affairs of other persons and legal entities, so that it required close attention and review before any meaningful conclusions could be drawn from any written or oral facts or material.

After months of diligent work to unravel the tangled financial affairs of the Tilney Company and of Tilney, a 7-page report "TO THE CUSTOMERS AND POSSIBLE CREDITORS OF TILNEY & COMPANY AND FREDERICK TILNEY", dated October 31, 1968 (plus 3 pages of financial information as of, and for the period of the receivership to, July 31, 1968), together with a form of proof of claim, were sent to the known creditors and customers (App.107-119).

During February 1969, several months after the mailing of the aforesaid report and proof of claim, a newspaper advertisement dated February 21, 1969 was published in The Wall Street Journal, The New York Times, Newsday, and The Anchorage Times, giving notice again to all creditors, customers and claimants of the Tilney Company or of Frederick Tilney that proofs of claim were available upon request.

Harris also corresponded and conferred on the phone and in person with the United States Attorney for the District of Alaska, and with customers whose securities or monies had been converted by Tilney or by the

Tilney Company, keeping them advised as to the progress of the receivership and the receivers' estimate of the outcome (Harris report, pp. 17-18; App. 431-432).

Real Estate

The building and land known as "Sundown" at Centre Island, New York, were occupied by Tilney and his family as a residence. This property was encumbered by a mortgage that was secured by a life insurance policy on Tilney's life issued by the mortgagee. At the inception of the receivership, the receivers and counsel analyzed the situation and determined that it was in the best interests of the receivership to keep the mortgage in good standing, the mortgage having an unpaid balance of approximately $30,000 and the value of the property being at least $125,000.

Each monthly payment on the mortgage enhanced the cash surrender value of the insurance policy and protected the interest of Mrs. Tilney in the death proceeds, which value and proceeds would be exempt from the claims of creditors under the insurance law of New York. Furthermore, it was discovered that the insurance company was holding dividend accumulations of more than $1,700, also

exempt under New York law. Therefore, the receivers insisted that the dividend accumulations be obtained from the insurance company and turned over to the receivership. In addition, in order to protect and reimburse the receivership in the event of Tilney's death, the receivers obtained a collateral assignment of the policy.

There were additional parcels of real estate on Centre Island in which Tilney has an interest, and in some of which the title was held by Mr. and Mrs. Tilney, presumably as tenants by the entirety. The receivers were burdened with the problem of payment of taxes on these properties, the maintenance of insurance, etc. In discussing the question of values of the several properties, Tilney maintained that some of the properties belonged to Mrs. Tilney for the purpose of avoiding certain zoning requirements. This, in turn, interfered with the ability of the receivers and their counsel to come to some considered judgment as to the respective values for the purposes of liquidation. Nevertheless, Harris early recognized the fact that there were substantial values inherent in the foregoing real estate, together with the real estate hereinafter referred to, supporting Harris' early opinion that the receivership would be able to pay off all just claims and creditors in

full (Harris report, pp. 19-21; App. 433-435).

As to the real estate in Anchorage, Alaska, Harris agreed with his co-receiver to protect the same at the time of the foreclosure of the mortgage on that property early in the course of the receivership by acquiring the deed thereto (Harris report, p. 21; App. 435).

Marine Midland Grace Trust Company of New York

Attorneys for Marine Midland Grace Trust Company of New York ("Marine Midland") had strenuously objected to any injunction prohibiting their client, as a pledgee bank, from selling securities pledged by the Tilney Company. Harris, therefore, took immediate steps to review and analyze the entire matter of the then existing relationships between Marine Midland, the Tilney Company, Tilney and GSC.

On January 9, 1968, arrangements were made for the sale of 974 shares of the Bank of Suffolk County, then held by Marine Midland as collateral, for $98,175. This sum was more than sufficient to satisfy the balance due to Marine Midland as a lien creditor of the Tilney Company (Harris report, pp. 23-24; App. 437-438).

A subsequent sale of an additional 130 shares of the stock of the Bank of Suffolk County for $13,000 was arranged while the securities were still in the

possession of Marine Midland as pledgee. Harris then engaged in negotiations with Marine Midland opposing the Bank's intent to deduct its legal expenses from the surplus cash and other collateral. Ultimately, all excess collateral was delivered to the receivers without any deduction for such expenses (Harris report, p. 24; App.438).

Marine Midland and GSC 7-1/2% Sinking Fund Notes

GSC, almost all of the stock of which is owned by Tilney, had issued $104,000 principal amount 10-year 7-1/2% sinking fund notes due December 1, 1969. $89,000 of said notes, payable to the Tilney Company, were held as collateral by Marine Midland. Marine Midland had obtained a judgment against GSC. Long Island National Bank was also a creditor of GSC (Harris report, p. 25; App.439).

After extensive negotiations, Harris arranged to have borrowings against the key-men life policies of GSC (that were held by Marine Midland as custodian) effectuated. Marine Midland thus satisfied its judgment against GSC and resigned as custodian, and Long Island National Bank received a significant reduction in the balance of the loan due from the Tilney Company (Harris report, pp. 25-27; App. 439-441).

Claim Against D. Raymond Kenney,
d/b/a D. Raymond Kenney & Co.

From the inception of the receivership, Tilney brought to the attention of the receivers, and thereafter repeatedly referred to a claim against the above-named broker-dealer arising from joint ventures going back more than 5 years (Harris report, p. 29; App.443).

The receivers sued Kenney. Their motion for summary judgment was granted, and a judgment was entered in favor of the receivers for $107,815.49, plus interest, on July 2, 1968. After extensive conferences, meetings and negotiations among Harris, counsel to the receivers, Kenney's attorneys, Kenney, Tilney and the SEC (Kenney, had been a registered broker-dealer), a cash offer of $85,000 in full satisfaction of the judgment was received. This was discussed between counsel and the receivers and Tilney (who objected to the acceptance of said settlement). The receivers and their counsel were of the opinion that it was a favorable offer, and the Court below authorized the acceptance of the settlement (Harris report, pp. 29-30; App. 443-444).

Matinecock Bank

At its inception, the receivership estate included 6,066 shares of stock of Matinecock Bank, Locust

Valley, New York. Some of these shares were pledged with Long Island National Bank, Franklin National Bank and Marine Midland Grace Trust Company.

The receivers analyzed the then existing market for the shares and noted that, in connection with the sale by Matinecock Bank itself of 149 shares of stock resulting from the aggregate of fractions at the time of the payment of a stock dividend in the winter of 1968, said bank received a highest bid of $23.31 per share. In any event, the liquidation of these shares was considered and was the subject of numerous conferences between brokerage firms and the receivers, and between Tilney and the receivers.

Through the president of the bank, the receivers received an offer of $15.00 per share in March 1968. On May 10, 1968, through a brokerage firm, a bid was received of $20.00 a share net for the entire block of 6,066 shares, and this bid was accepted with the acquiescence of all concerned, including Tilney. The aggregate funds derived from the sale of said shares amounted to $121,016.70, portions of which were paid to Long Island National Bank and Franklin National Bank as pledgees of portions of said shares (Harris report, pp. 41-42; App. 455-456).

Franklin National Bank

At the commencement of the receivership, the Tilney Company owed Franklin National Bank $363,300 secured by various tax-exempt bonds and by common shares of ten companies. The approximate market value of all of the pledged securities was about equal to the amount of the loan. About half of the debt securities were issues of Alaska State Development Corp., not well recognized for investment in the financial markets in which municipal bonds were bought and sold (Harris report, p. 49; App.463).

After all of the pledged securities had been liquidated, the bank maintained that there was due to it the sum of $2,734.56 as of August 5, 1968, plus a claim for interest for May, June and July of $366.02. Thus, the receivers, in the case of this pledgee bank alone, effectuated the sale of more than $350,000 of securities (Harris report, p. 50; App. 464).

Matanuska Valley Bank

At the commencement of the receivership, the Tilney Company owed Matanuska Valley Bank, Anchorage, Alaska, the sum of $66,000 collateralized by 1,800 shares of stock of Alaska State Bank, $46,094 principal amount of debentures issued by City Commerce Corp., and 69,268

shares of common stock of City Commerce Corp. (Harris report, p. 58; App.472).

During the Fall of 1968 and the Winter of 1969, as a result of the liquidation by the receivers of a portion of the collateral held by said bank, the loan of the Tilney Company was paid off, and the receivers were paid the surplus cash and collateral (Harris report, p. 61; App.475).

In the course of the attempts by the receivers to liquidate the collateral, Tilney wrote a letter to a potential purchaser describing the receivers as "two very excellent attorneys, as well as practical businessmen. ..." (Harris report, p. 60; App.474).

Alaska State Bank

The receivership estate included a substantial number of shares of Alaska State Bank (Harris report, p. 65; App. 479). During the early stages of the receivership, the receivers sold small lots of stock of this bank through the cooperation of bank personnel (Harris report, p. 65; App.479).

In the Spring of 1968, the bank advised Harris that they were considering authorizing the sale of additional capital stock which complicated the receivers'

efforts to sell their shares. The bank's sale was authorized at $38 per share in August 1968 (Harris report, pp. 65-67; App.479-481).

Upon his return to New York from Anchorage, Alaska, in August 1968, Harris effected a sale of 150 shares of Alaska State Bank at $39 per share to a former employee of Tilney & Company. Harris rejected a bid of $38 per share for the remaining 3,529 shares. Thereafter, 3,329 of the remaining shares were sold through a Seattle, Washington, brokerage firm for $39 per share (Harris report, p. 67; App.481).

Tilney, acting on behalf of Tilney & Co., Inc., a corporation controlled by Tilney, but not a party to this action, in another of his obstructionist tactics, made claim to the remaining 200 shares of Alaska State Bank held by the receivers. Harris determined that the risk of retaining said latter shares pending the resolution of the claim of ownership and the resolution of the mutual debits and credits between said corporation and the Tilney Company was minimal, so the said shares were not sold (Harris report, p. 67; App.481).

City Commerce Corp.

The assets of the receivership estate included 76,697 shares of City Commerce Corp.("CCC") and $55,844

principal amount of 7% debentures of CCC, the latter controlling Alaska State Bank. CCC also owned the building in Anchorage, Alaska in which the office of the Tilney Company and GSC was located. At the time of the commencement of the receivership, there was $440.00 of unpaid rent due to CCC with respect to this office (Harris report, pp. 67-68; App. 481-482).

Harris worked out arrangements with CCC whereby it would be paid for the use and occupancy of the Anchorage office for two months as an administration expense of $530, and CCC would file a claim in the receivership of the Tilney Company only for the rents accrued up to the date of the commencement of the receivership. All other charges for rent for the period from and after the commencement of the receivership would be pressed solely against GSC. These arrangements were agreeable to the receivers and to Tilney by reason of the fact that Tilney had insisted that the space be maintained on behalf of GSC for a longer period of time than the receivers felt necessary. Harris persuaded the landlord to accept these arrangements and a written release, dated September 30, 1968, was obtained, signed by CCC,

releasing the receivership estates from any claims from and after December 18, 1967 (Harris report, pp. 68-69; App. 482-483).

In the winter of 1969, Tilney visited Anchorage and had conversations with a Mrs. Crawford, the controlling shareholder of CCC, as well as with officers of other institutions with which the receivers still had to deal. Tilney's meddling resulted in CCC, the obligor on $55,844 of 7% debentures held by the receivers, setting off $1,760 against a semi-annual interest payment of $1,954.54 due January 1, 1969, claiming that the former sum was due for rents from November 1967 through August 1968. Apparently CCC acted in reliance upon unfounded representations by Tilney to Mrs. Crawford that everything was working out well, that he would soon be restored to full control of the securities of CCC, and that the interest payment on the debentures would cover all of the amounts due as rent to CCC (Harris report, p. 69; App. 483).

City of Nome

One of the most serious problems facing the receivers was the claim of the City of Nome, Alaska

("Nome"), arising out of a firm underwriting commitment for $910,000 entered into by the Tilney Company with Nome several years prior to the commencement of the receivership. At the same time, Tilney maintained that his company, GSC, was a bona fide creditor of Nome for fiscal services allegedly rendered and disbursements incurred in connection with the same underwriting. In reliance upon the firm underwriting commitment of the Tilney Company, Nome had sold bond anticipation notes. Because the Tilney Company defaulted in buying or arranging the sale of $910,000 of bonds, Nome defaulted in the repayment at maturity of the bond anticipation notes (Harris report, p. 62; App. 476).

In 1968, Nome commenced an action against the receivership estates, GSC and Mrs. Tilney seeking damages in excess of $2,000,000. Unless the action could be settled for a reasonable amount, the closing of the receivership estates would have been indefinitely delayed, and it also might have been impossible to close said estates with all creditors being paid in full (Harris report, pp. 62-63; App. 476-477).

After extensive negotiations, it was determined that the Nome action could be settled by the payment of not more than $20,000 to Nome and the waiving by GSC of its claim against Nome for services and disbursements incurred in connection with the abortive underwriting. Tilney, however, refused to approve of any such settlement (Harris report, pp. 63-64; App. 477-478).

Ultimately, after a hearing below and with the authorization obtained therein embodied in an order dated April 15, 1969 (App. 167), the Nome suit and all claims therein were settled in consideration of the payment of $20,000 by the receivers to Nome and the discontinuance with prejudice by GSC of its counterclaim. Inasmuch as GSC owed the Tilney Company more than $600,000 and was insolvent, the receivers agreed to credit GSC's debt due to the Tilney Company in the sum of $44,000 (Harris report, p. 64; App. 478).

Tilney's interference in the Nome lawsuit, which included a trip by him to Alaska, aggravated the receivers' settlement negotiations. This and other meddling by Tilney prompted the court below to direct Tilney to "cease and desist from any activities in connection with this

estate without the further permission of this Court." (Transcript, 6/5/69, pp. 56-57; App. 210-211).

The Waddington Bank

Included in the assets of the estate were 787.251 shares of The Waddington Bank, a small bank in upstate Waddington, New York ("Waddington"). Tilney's wife owned an additional 96 shares of Waddington (Harris report, p. 43; App. 457). This block of 883.251 shares represented approximately 35% of the outstanding shares of Waddington.

Since there was no ready or organized market for shares of Waddington (Transcript, 6/5/69, p. 9; App. 177), Harris, in early 1968, spoke with a Waddington director, who was also counsel to the bank, to see if he might know of anyone interested in buying the shares.* The director told Harris that Waddington shares were traded infrequently, but stated that he and his associates might offer a price of $23 to $25 a share (Transcript, 6/5/69, p. 20; App. 188). Early in the receivership, Harris had concluded that it would be difficult for the receivers to

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*The practice followed by the receivers in selling infrequently traded bank stock was to approach officers and directors of the bank in an attempt to find potential buyers. Tilney knew and approved of this practice by the receivers (Transcript, 4/7/69, p. 34; App. 165).

value and sell the Waddington shares because his analysis of what little information was available showed the bank might be required to write off loans that were substantial in relation to its total resources of approximately $1,500,000 (Transcript, 2/27/68, pp. 34-35; App. 61-62).*

Attempting to realize what Harris believed to be the maximum price obtainable for the block of shares, Harris began negotiations in the spring of 1968 to sell the block to a Mr. Jack Studley ("Studley"), a friend of Harris, at a price of $50 per share. In May 1968, Hogan, the co-receiver, in his attempts to sell the block, had advised Blythe & Company that they could purchase the Waddington shares for $47 per share (Transcript, 6/5/69, p. 3; App. 171). In view of the continuing negotiations with Studley and his anticipated bid at $50 per share, Blythe was told that it would have to match or better, which it did not do, $50 per share (Transcript, 6/5/69,p.3; App. 171).

Thereafter, in July 1968, the Waddington shares were sold by the receivers to Studley for the higher price of $50 per share (Transcript, 6/5/69, pp. 4, 18-19; App. 172, 186-187). Tilney approved this sale and he and his wife signed the necessary papers to complete the sale to Studley.

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*The net book value of the bank at 12/31/67 was approximately $130,000.

Tilney had made representations as to Waddington's financial condition to Harris for transmittal to Studley. Studley was thereby induced to pay this price of $50 per share for the Waddington shares (Transcript, 6/26/69, p. 7; App. 218). These representations made by Tilney later proved false (Transcript, 6/26/69, p. 7; App. 218).

Tilney, co-receiver Hogan, and the attorneys for the receivers, all had known that Harris had been negotiating the sale of the Waddington shares to Studley and that Studley ultimately bought the Waddington shares (Transcript, 6/5/69, pp. 5-7; App.173-175). Tilney was quite satisfied with the price of $50 per share since he had already approved of the receivers' offering of the shares at $47 per share (Transcript, 6/5/69, pp. 17-18; App. 185-186).

Several months later, Studley learned that the financial condition of Waddington was not excellent, as Tilney had earlier represented; in fact, the bank was found by Studley to be in terrible condition. Studley then asked Harris, who had had considerable

experience in banking, to become a director of the bank in order to help Studley salvage his investment, and to save the bank itself (Harris report, pp. 43, 46; App. 457, 460 ; Transcript, 6/5/69, p. 4; App. 172). Harris agreed and was elected as a director on January 15, 1969. To qualify Harris as a director, Studley transferred 100 of the Waddington shares into Harris' name of record only (Transcript, 6/5/69, pp. 4-6; App. 172-174).

Except for the receipt by Harris of a fee of $15 for attending a meeting of directors of Waddington (Transcript, 6/5/69, p. 5; App. 173), Harris received nothing from the sale of the Waddington shares to Studley or from becoming a Waddington director. Moreover, Tilney himself acknowledged the accuracy of Harris' recitation concerning the Waddington matter (Transcript, 6/5/69, p. 14; App.182).

At the June 5, 1969 hearing, it is unclear whether Tilney objected to the Waddington transaction because Harris knew Studley, or because Harris became a

director of Waddington months after the sale, or because the price of $50 per share, to which Tilney had agreed, was now no longer acceptable to him, or simply as another manifestation of Tilney's recalcitrant and obstructionist behavior throughout the proceedings below (Transcript, 6/28/71, p. 3; App. 713). Tilney stated that he was "one hundred percent in accord" with the sale of any asset at any price to raise funds to pay creditors. He also stated that the only issue was whether the highest value had been obtained for the shares (Transcript, 6/5/69, p. 15; App. 183).

Nevertheless, after being virtually in daily contact with the receivers and participating in or approving or acquiescing in the sale of estate assets by the receivers (Transcript, 4/19/72, pp. 52-55; App. 1036-1039), Tilney suddenly reversed field and attacked the adequacy of the $50 per share paid for the Waddington shares ten months earlier. He now claimed that the book value of the Waddington shares was approximately $70 per share*, and, moreover,

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*At the same hearing on June 5, 1969, Tilney claimed that the book value was $51.50 per share (Transcript, 6/5/69, pp. 23-24; App. 191-192).

that since the stock represented a controlling interest* in Waddington, it was worth even more than book value (Transcript, 6/5/69, p. 15; App. 183).

On July 16, 1969, Harris reported to the court that Studley had agreed to undo the sale of the Waddington shares so that, if the court desired, a public auction might bring the estate the higher price Tilney had represented was obtainable. An attorney for the SEC agreed with the court that an auction would establish the fairness of the price received, but stated that what the court (and the SEC) might want was not "rescission qua rescission" but a method by which, if the auction brought less than $50 per share, Studley would still be bound (Transcript, 7/16/69, pp. 46 - 48; App. 288-290).

In answer to Tilney's demand that Harris resign as co-receiver, Harris stated that he was prepared to do anything , even resign (which he subsequently did), if it would assist in the speedy conclusion of the receivership estate (Transcript, 6/26/69, p. 38; App. 224).

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* The record below disputes Tilney's assertion that the shares represented "control" (Transcript, 6/5/69, pp. 23-24; App. 191-192).

The court, noting that Tilney's request that Harris resign was irrelevant, replied that the record demonstrated that Harris had not been guilty of any impropriety and that Harris had performed competently as a receiver of the estate. The court also noted that Harris's resignation was voluntary and without pressure or order of the court (Transcript, 6/26/69, p. 39; App. 225). On July 16, 1969, the court signed an order accepting Harris's resignation (App. 296).

The subsequent auction of the Waddington shares was extensively advertised. Tilney prepared and distributed literature designed to stimulate interest in the shares. The shares were offered on September 24, 1974 by a sophisticated and experienced auctioneer at an upset price of $50 per share in lots of 100 shares, with a final lot of 87.251 shares, and as one bulk lot of 787.251 shares to seek the maximum price to the estate (Transcript, 9/24/69, pp. 3-6; App. 310-313).

After all of the extensive and expensive plans for the auction, no bids were made for any 100-share lots or for the 87.251-share lot, and only one bid of $50 per share was made for the bulk lot of 787.251 shares (Transcript, 9/24/69, pp. 6-8; App.313-315). Thus, the price paid for the Waddington block was no higher than the price received by Harris 14 months earlier. Clearly, this satisfied the SEC (and any other reasonable person) as to the adequacy and fairness of the price in the earlier sale of the Waddington shares to Studley.

Immediately after receiving the one $50 bid, the court expressed its distress with the result, lamenting the waste of $4,000 for advertising and auctioneer expense. The court stated that the day before the sale it had confirmed that there was no market in the pink sheets for the Waddington shares and had learned that the National Bank Survey recorded but two bids (at $20 and $21.50 per share) for the Waddington shares during all of 1968, and recorded no offers. One of the bidders was A. Brill & Company (Transcript, 9/24/69, pp. 10, 18; App.316, 322). It is noteworthy that Tilney earlier said he had been offered Waddington shares at a price of $65 per share by this bidder (Transcript, 6/5/69, p. 15; App. 183).

Concerning Tilney's misleading, if not intionally false, representations as to the value of the Waddington shares, the Court stated:

> "...at some phases of our hearings we have certainly not been presented with very accurate facts or representations. This sale has cost us approximately $4,000.... I am very distressed.... [W]e have been euchered into a situation, the Court, the Receiver and the SEC. I think the record will indicate that representations were made that this stock was worth $70 or $80 a share." (Transcript, 9/24/69, p.18; App. 322).

Long Island National Bank

At the commencment of the receivership, the Tilney Company owed $139,200 to Long Island National Bank secured by pledges of various securities, including shares of various small Long Island banks, a bank in Yonkers, and four banks in Alaska. Harris immediately began to liquidate these securities (Harris report, p.31; App. 445).

As part of the overall relationship with Long Island National Bank, it was discovered that the Tilney Company, Tilney, Mrs. Dorothy M. Tilney and GSC were co-obligors or accommodation makers with respect to any loans or advances made by the bank to any one of them

(Harris report, pp. 31-32; App. 445-446).

At the commencement of the receivership, GSC owed Long Island National Bank $92,000 and had pledged with said bank a $95,000 4% note of Alaska State Development Corporation ("ASDC"), due August 1, 1973 (Harris report p.32; App. 446). The Tilney Company owned a $30,000 certificate of deposit that was also pledged as security for the GSC loan. Upon the liquidation of the $30,000 certificate of deposit, Long Island National Bank, against Harris' instructions and in accordance with the instructions of GSC, a corporation controlled by Tilney, applied the $30,000 in reduction of the $92,000 debt of GSC (Harris report, pp.26-27, 31-32; App. 440-441, 445-446).

Harris unsuccessfully attempted to find a market for the ASDC $95,000 note with various banks and brokerage firms. Harris then wrote to ASDC and negotiated with it and obtained its bid to buy the $95,000 note at a 20% discount, including a provision that the bid would be held open for 30 days from September 30, 1968 (Harris report, pp. 32-33; App. 446-447).

Harris sought to induce Tilney, on behalf of GSC, to accept the bid and made demand on Long Island National Bank to accept the bid as pledgee of the ASDC Note. Tilney, on the stationery of GSC, and directly at variance with the interest of the receivership that he supposedly wanted to be wound up at the earliest possible date, advised the bank not to comply with Harris' demand that the ASDC bid be accepted. The bank relied upon Tilney's instructions. Had Long Island National Bank complied with Harris' demand, $76,000 would have been collected, against which Long Island National Bank was due $62,000. Thus, a $14,000 surplus would have resulted from this transaction alone, to be turned over to the receivers, on behalf of the Tilney Company, to reimburse the Tilney Company for the use of the $30,000 certificate of deposit or in reduction of GSC 7-1/2% sinking fund notes owned by the Tilney Company still held as collateral by said bank. The other collateral, consisting of substantial cash and securities, then being held by the bank would also have been returned to the receivers (Harris report, pp. 33-34; App. 447-448).

Since approximately October 1968, the Tilney Company did not owe any money to Long Island

National Bank as a result of the liquidations of securities effected by the receivers. Because that bank was holding substantial cash belonging to the Tilney Company (and additional securities as collateral for the obligation of GSC), Harris put the bank on notice of a claim for interest on all surplus funds and possibly other damages for its acts, and omissions to act, to the prejudice of the receivership estates (Harris report, p. 34; App. 448).

National Bank of Alaska and
Alaska Central Utilities

At the inception of the receivership, Tilney owed $1,000 to National Bank of Alaska, Anchorage, Alaska, and that bank held 6,509 shares of Central Alaska Utilities ("CAU") as collateral security for the loan. Tilney indicated that CAU shares had a market value of $3.00 per share (Harris report, p. 51; App. 465).

Tilney also owned 41 shares of National Bank of Alaska, 31 of which were pledged with Long Island National Bank. In addition, the Tilney Company owned 98 shares of National Bank of Alaska, 47 of which were pledged with Long Island National Bank (Harris report, p. 51; App. 465).

On March 5, 1968, arrangements were made through an officer of National Bank of Alaska to sell the 139 shares of its stock, referred to above, plus one additional share owned by Tilney's wife to various purchasers in Alaska at a price of $60.00 per share (Harris report, p. 51; App. 465).

In December 1968, National Bank of Alaska demanded that the receivers authorize the sale of the CAU shares at any price that would satisfy the bank. About two weeks later the bank wrote that it received a firm offer of $1 per share for the CAU shares. The bank went on to write that Tilney had been to the bank recently and reached an "agreement" with the bank that was enclosed (Harris report, p. 55; App. 469). This so-called agreement was so totally at variance with any understanding Harris had of the situation that he had no alternative but to notify the bank not to rely on any agreements with Tilney reached during the pendency of the receivership. Harris subsequently learned that Tilney had taken it upon himself to deal directly with CAU (Harris report, pp. 55-57; App.469-471). This was but one more instance of the improper intervention by Tilney in the administration of the estate.

Correction of Material Distortions in Brief of Defendants-Appellants

It is impossible to detail and to respond to the great number of distortions contained in the brief of defendants-appellants. An examination of the actual record, as against their version of the record, will demonstrate such distortions beyond question. Set forth in the Hogan brief and below are examples, but by no means, all, of the distortions:

More than $1,000,000 of Estate Liabilities were Paid by the Receivers

Throughout their brief, defendants-appellants state that the total of claims paid by the receivers was $265,000. It is thus erroneously implied that the total liabilities of the estate paid were $265,000. The fact is, and as shown in Exhibit D to the Final Report and Account of the receivers dated July 31, 1973 (App. 1268-1269), total liabilities paid to all creditors was $1,068,052, including $743,665 paid to banks. Contrary to the distortions of defendants-appellants, these monies were not "transferred" to banks or other creditors nor was collateral delivered to banks or other creditors in lieu of payment of these monies.

More than $1,000,000 was Collected by the Receivers from the Sale of Assets of the Estate

Contrary to the position taken by defendants-

appellants in their brief, and as is shown by Exhibit C to said Final Report and Account (App.1267-1268), $1,340,081 was received by the estate from the sale of its assets as of March 31, 1973.

Harris withdrew as Receiver on July 16, 1969

Throughout their brief, the defendants-appellants refer to receivers, in the plural, for estate transactions subsequent to July 16, 1969, the date of Harris' withdrawal as co-receiver. In fact, after July 16, 1969, Hogan was the sole receiver of the estate.

ARGUMENT

POINT I

HARRIS SHOULD NOT HAVE BEEN SURCHARGED WITH THE $7,000 ESTATE EXPENSE TO AUCTION THE WADDINGTON SHARES

After hearing, the court below issued its opinion dated October 19, 1972 (App. 1190) expressly finding that Harris did not, as contended by the Tilney Company and Tilney, breach his fiduciary duty in connection with the sale of the Waddington shares to Studley or becoming a director of the bank. Said the court, at p. 9 of the opinion:

> "Defendants' allegation that Mr. Harris breached his fiduciary duty to the estate is not supported by any credible facts in the record. While Mr. Harris' judgment in failing to disclose his friendship with Studley to the court and in accepting a seat on the Board of the Waddington Bank does not invite approbation, it is not grounds to bar the recovery by Mr. Harris of the reasonable value of his services. The Commission seems to be of a similar mind. It does not oppose the awarding of reasonable fees to Mr. Harris." (App. 1198)

The above opinion and finding of the court below is amply supported by the record concerning The Waddington Bank matter, supra, pp. 27-35. Yet, in the face of that opinion and finding, the court below, after indicating that a fair fee was $30,800, went on to say:

> "Against this [$30,800], however, there must be offset the [$7,000] cost of resale of the Waddington stock." (App. 1199)

Thus, after expressly finding that Harris had breached no fiduciary obligation owing to the estate, the court below nevertheless surcharged Harris with that $7,000.

Neither the federal statutes (§§2001 and 2004 of 28 U.S.C.) nor the New York state statute (§7001 of the New York State Banking Law) nor any of the cases cited by defendants-appellants on pp. 40 through 42 of their brief support the $7,000 surcharge of Harris.

In Crites, Inc. v. Prudential Insurance Company of America, 322 U.S. 408 (1944), the receiver

secretly entered into a commission sharing agreement with a real estate broker and shared in such commission in connection with the sale of receivership real estate. This transaction resulted in a substantial loss to the estate. The receiver also entered into a secretive fee splitting arrangement with, and received fees from, attorneys for the receiver and for the mortgagee. In the case at bar, co-receiver Hogan and Tilney knew of Harris' friendship with Studley. They also participated in and approved of the sale of the Waddington shares to Studley at $50 per share, the highest price obtainable. Here, there was no secret about these material matters. Here, also, the estate sustained no loss, unlike Crites.

Moreover, the circumstances under which Harris became a Waddington director are consistent with Harris, as a receiver, being interested in helping Studley salvage his investment. Studley may well have had a claim against the estate in connection with his purchase of the Waddington shares.

In Surface Transit, Inc. v. Saxe, Bacon & O'Shea, 266 F. 2d 862 (2d Cir.1959), cert. denied, 361 U.S. 862 (1959), a reorganization proceeding under the federal bankruptcy laws, this Court denied compensation to fiduciaries, who, in violation of section 249 of the bankruptcy law, engaged in transactions in stock of, or claims against, the debtor.

In the case at bar, Harris did not profit or attempt to profit personally in the transaction with Studley and did not trade in any securities issued by the Tilney Company on the basis of inside information or otherwise. On the contrary, the estate profited from the price of $50 per share paid by Studley.

In re Garrett Road Corp., 256 F. Supp. 709 (E.D. Pa. 1966) does not involve the question of forfeiture by a fiduciary of fair and reasonable compensation payable to him for services rendered. It does, however, at p.713, set forth the criteria for determining the amount of fair compensation, which Harris

was denied, such criteria being:

> "The time spent, the intricacy of the problems involved, the size of the estate, the opposition met, the results achieved ...."

In N. & G. Taylor Co. v. Berger, 49 F. Supp. 524 (E.D. Pa.1943), the court refused to deny fair compensation to a receiver since the alleged unauthorized act did not involve any loss to the estate. The court noted, at p.526, that:

> "... unless the irregularities amount to fraud or conversion of funds the severe penalty of forfeiture of all compensation should not be imposed. Nor is it possible to take a middle ground and allow a receiver something substantially less than fair value of his services. Either his compensation is forfeited or he is entitled to what his services are worth. In the present case, I think the receiver is entitled to be compensated at the fair value of his time and effort."

Applying the standards of the N. & G. Taylor case, supra, Harris should neither forfeit the compensation heretofore paid to him nor should he have been surcharged the $7,000. The record below showed,and Chief Judge Edelstein so found,

that Harris had not committed a breach of any fiduciary obligation. Moreover, Harris was not guilty of any fraud or conversion of funds.

In Meinhard v. Salmon, 249 N.Y. 458 (1928), the court found a breach of fiduciary duty had occurred when one partner appropriated to his own use a renewal of the partnership lease, though its term was to begin at the expiration of the partnership.

To the contrary, the court below expressly held and found that Harris had not breached any fiduciary duty in connection with any aspect of the Waddington matter (Opinion, 10/19/72, p.9; App. 1198).

Nor does any statute mandate the repayment by Harris of the $23,800 paid to him in 1973. As shown in Point I of receiver Hogan's brief, all sales of receivership assets were conducted in accordance with §§2001 and 2004 of 28 U.S.C., in accordance with the express language of the consent judgment of December 18, 1967 (App. 25), and in accordance with the rule stated in the case of Tanzer v.

Huffines, 412 F. 2d 221 (3d Cir.1969), cert. denied 396 U.S. 877 (1969).

Finally, the reliance by defendants-appellants on §7001 of the New York State Banking Law is misplaced. In view of the circumstances under which Harris became a Waddington director -- to help salvage Studley's investment, to help save the bank itself, and hopefully, by saving the bank, to reduce the likelihood of a claim by Studley against the estate --the banking authorities having jurisdiction in the matter would not reasonably claim that Harris violated that statute. It ill behooves Tilney, a wilful violator of the federal securities laws and a convicted felon thereunder (Def.Br.,p.19), to point an accusing finger at Harris.

Notwithstanding the considerable efforts made by the receivers to get the highest possible price for the Waddington shares, the best they could do was the $50 per share paid by Studley. Since Tilney had, as the court below stated, euchred

everyone into believing that the $50 per share price was far from the true value of the Waddington shares, the court below determined, upon the recommendation of a representative of the SEC and of Tilney, that a public auction of the shares was the course to follow. Accordingly, any expenses incurred in connection with that decision were and should be estate expenses, including the costs of advertising and of the auctioneer, as well as the time of receiver Hogan and his attorneys. Harris contends that it was improper, therefore, to surcharge him with that $7,000 estate expense, particularly since he and his co-receiver were at all times convinced that $50 per share was the best price that could be, and that was, received for the Waddington shares. It was Tilney who misled everyone -- the court, the SEC and receiver Hogan -- into believing that the shares would bring $70 to $80 per share at auction.

Even where a receiver personally profited by receipt of commissions on insurance of the estate, which he placed with his own insurance agency without

the knowledge or approval of the court, he was held not to be surchargeable for such commissions since beneficiaries of the estate had knowledge thereof. In re Real Estate Mortgage Guaranty Co., 55 F.Supp. 749 (E.D. Pa. 1944). This Court, in In re Calton Crescent, Inc., 173 Fed. 2d 1944 (1949), aff'd., 338 U. S. 304 (1949), cited the In re Real Estate Mortgage Guaranty Co. case, supra, with approval.

A fortiori, Harris should not have been surcharged with the $7,000 of estate expenses for the public auction of the Waddington shares since, as the court below found and the record establishes, Harris, unlike the receiver in In re Real Estate Mortgage Guaranty Co., supra, did not personally profit in the Waddington matter. Moreover, like beneficiaries in that case, the beneficiary in the case at bar, Tilney, knew that the sale of the Waddington shares was made to a friend of Harris and also knew of, participated in, and approved of, the price of $50 per share.

POINT II

HARRIS WAS ENTITLED TO, BUT WAS NOT PAID, FAIR AND REASONABLE COMPENSATION FOR HIS SERVICES

Compensation to receivers should be fair and reasonable. Securities and Exchange Commission v. W. L. Moody & Co., Bankers (Unincorporated), 374 F. Supp. 465 (S.D.Tex.1974); Securities and Exchange Commission v. Charles Plohn & Co., CCH Federal Securities Law Reporter, Transfer Binder '70-'71 decisions, ¶93,045 (S.D.N.Y.1971).

The amount of the compensation allowed to a receiver is a matter within the discretion of the District Court. The exercise of that discretion will not be upset unless it is shown, as Harris shows below, that such discretion was abused. Commodity Credit Corporation v. Bell, 107 F. 2d 1001 (5th Cir. 1939); Coskery v. Roberts & Mander Corp., 200 F. 2d 150 (3rd Cir. 1952); Wyant v. United States Fidelity & Guarantee Co., 116 F. 2d 83 (4th Cir.1940), cert. den., Wyant v. Caldwell, 314 U.S. 610 (1941).

With respect to Harris' services and background, the court below stated in its opinion of October 19, 1972 (App.1198-1199) that:

> "The services rendered by Mr. Harris were considerable. Mr. Harris is an attorney whose primary area of experience is in the field of business and banking law. He brought this experience to bear inthis receivership in negotiations with banks, disentangling loan agreements, tracing collateral, and helping to clarify the involved financial relationships of the defendants."

Notwithstanding the recognition by the court of the considerable and valuable services rendered by Harris in a complex receivership, Harris was awarded compensation of $23,800 for his 884.7 hours of services in 19 months, or approximately $27 per hour.

The paucity of the allowance to Harris is accentuated by the fact that Harris maintained his own office and staff and incurred substantial overhead expenses throughout the period of his receivership. Harris' personnel were required to expend substantial amounts of time in connection with receivership matters (Harris report, p.7; App. 421).

Harris, nevertheless, did not apply for reimbursement of the expenses of utilizing his office and personnel and requested an allowance only for the time he personally devoted to the receivership estate and his actual out-of-pocket expenses.

Were the receivers not as conscientious about preserving the assets of the estate as were Harris and Hogan, they could have elected to maintain the office of Tilney Company at 1 Wall Street for receivership business and maintained a receivership staff there, at the expense of the receivership estate. This would have relieved the receivers of the additional expense of transacting receivership business in their respective offices with their respective staffs. However, in the interests of economy, the receivers closed that office as soon as possible to preserve the receivership estate (Harris report, pp.15-16; App. 429-430).

In Securities and Exchange Commission v. Charles Plohn & Co., supra, a receivership similar

to the receivership here, including the fact that the receivership estate was solvent, the receiver requested and was awarded an allowance at the rate of $100 per hour for his services. There, a comparison was made between the requested allowance by the receiver and salaries paid to corporate executives. The district court noted, at page 90,870, that this comparison:

> "fails to recognize that officers' salaries do not include rent, secretarial help and the other overhead expenses, all of which are absorbed and included in the charge sought by the receiver in this proceeding."

In determining the proper allowance for a receiver, it is relevant to consider the time and labor required of the receiver, the fair value of that time and labor, the degree of integrity and dispatch with which the receiver acted and the result obtained by the receiver. United States v. Larchwood Gardens, Inc., 404 F.2d 1108 (3rd Cir.1968).

Harris was required to and did devote enormous amounts of time to the receivership, even to the detriment of his legal practice. He acted

expeditiously and with great dispatch, evidenced in part by his report to the court below at the hearing of February 27, 1968 (Transcript 2/27/68, pp. 3-18, App. 42-57). His integrity was of the highest caliber, notwithstanding the baseless charges and distortions of fact by defendants-appellants, rebutted by the record below, concerning the Waddington Bank matter. The results obtained by Harris during his 19 months of service speak for themselves. His tireless work on behalf of the receivership enabled the receivership to obtain maximum consideration in the liquidation of the estate and resulted in all creditors being paid in full with interest (Hogan Br., pp. 11-13).

In Securities and Exchange Commission v. W. L. Moody & Co., Bankers (Unincorporated), supra, a receiver, like Harris and Hogan here, succeeded in assuring the solvency of the receivership estate, and requested compensation for his services. It was held that the receiver "is entitled to reasonable rather than niggardly compensation for this service."

(supra, at p.483). The court noted that "because of the efforts of Receiver, this estate can well afford to reasonably compensate Receiver and his attorney." (supra, at p.481).

Since all creditors of Tilney and the Tilney Company were paid in full with interest, and additional assets remain in the possession of receiver Hogan, "the bankruptcy rationale, that costs reduce the share to be paid creditors, does not apply." Securities and Exchange Commission v. W. L. Moody & Co., Bankers (Unincorporated), supra., at p.483. See also Securities and Exchange Commission v. Charles Plohn & Co., supra.

The SEC, in its memorandum in response to the requests for allowances, in recommending that Harris be paid $21,000 (that recommendation was subsequently increased to $23,500), recognized that the compensation recommended for Harris was at a rate less than what Harris receives in private practice but added, to justify their position, their doubt that

creditors would receive payment in full plus interest (the inapplicable bankruptcy rationale) (SEC Memorandum, 5/10/72, p.10; App. 1130). Thus, to the extent that the court below relied on the SEC's recommendation,* the court erred since a material assumption underlying the SEC's position proved inaccurate -- creditors have in fact been paid in full with interest.

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* One is justified in presuming that the court below did so rely, since the SEC recommended compensation of $23,500 for Harris and the court awarded $23,800 to Harris. See also Hogan Br., p. 37, for a comparison of the fees requested by Harris, Hogan, their attorneys and their accountants with the SEC recommendations, and the final awards.

CONCLUSION

FOR THE REASONS STATED IN THIS BRIEF AND IN THE HOGAN BRIEF, ALL JUDGMENTS, ORDERS AND RULINGS OF THE COURT BELOW SHOULD BE AFFIRMED, EXCEPT THAT THE ORDER BELOW OF DECEMBER 21, 1972 WHICH AWARDED COMPENSATION OF $23,800 TO HARRIS SHOULD BE MODIFIED AND THE COMPENSATION INCREASED TO THE FAIR AND REASONABLE SUM OF $57,500 OR $65 PER HOUR FOR THE SERVICES RENDERED BY HARRIS. IN ANY EVENT, SAID ORDER SHOULD BE MODIFIED TO THE EXTENT OF DIRECTING THE PAYMENT TO HARRIS OF THE $7,000 WITH WHICH HE WAS IMPROPERLY SURCHARGED. ALSO, HARRIS SHOULD BE AWARDED THE COSTS AND EXPENSES OF THIS APPEAL AND CROSS-APPEAL, INCLUDING HIS REASONABLE COUNSEL FEES.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECURITIES & EXCHANGE COMM.,
Plaintiff-Appellee,

- against -

TILNEY & CO., FREDERICK TILNEY,
Defendants-Appellants

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York
That on the 7th day of July *19* 75 *at* 1) 39 East 68th St., N. Y. N.Y.
2) 350 Fifth Ave, N.Y., N.Y. 3) 26 Federal Plaza, N.Y., N.Y.
deponent served the annexed Brief *upon*
1) Saxe Bacon Bolan & Manley 2) Wagner Quillinan & Tennant 3) Securities & Exchange Comm.
the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 7th
day of July, 19 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James Steele

JAMES STEELE